



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CRIMINAL APPEAL NO. 82 OF 2014**

**[Being an appeal from judgment by Hon. C.N. ORUO (R.M) on the 10<sup>th</sup> day of July, 2014 in Webuye Resident Magistrate's criminal case no. 144 of 2012]**

**ANTHONY WEKESA SIMIYU ..... APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

**JUDGEMENT**

1. The appellant **Anthony Wekesa Simiyu** was charged with the offence of defilement contrary to Section 8 (1) (3) of the Sexual Offences Act. He is serving a sentence of 20 years.
2. Being dissatisfied with the conviction and sentence the appellant preferred this appeal challenging credibility of the evidence before court and arguing that he was not accorded a fair hearing.
3. At the hearing the appellant was represented by Mr. Otsiula advocate who made oral submissions as follows; that the trial was not fair as the matter was adjourned severally contrary to Article 50 (2) (e) of the Constitution. The matter was adjourned 6 times at the request of the prosecution, further that the documents before court did not support element of the offence, the P3 form did not indicate the gravity of harm, neither penetration and other children named were not called as witnesses.
4. Mr. Kamau State Counsel objected to the appeal on grounds that; evidence of PW2, 3 & 4 was consistent with evidence of **PW1**; and therefore there was collaboration. Further that the issue regarding Article 50 2(e) of the Constitution was not raised at the trial and therefore ought not to arise on appeal. He argued further that the prosecution case was proved to the required standard.
5. This is the first appellate court and it must consider the evidence on record afresh, analyze and evaluate the same in order to arrive at an independent decision **See Okeno Vs. Republic [1973] E.A.**

The prosecution case in brief is that the appellant on or around the 17<sup>th</sup> of February 2012 at about 4.30 a.m. was found in the home of PW2 the mother to PW1, in the kitchen asleep with **PW1** a minor then aged 15 years. PW1 confirmed that on the material day the appellant went to the kitchen when she slept, pushed to door and asked to sleep with her and they had sex in the process. **PW2** went to the kitchen to prepare breakfast at about 4.30 a.m. knocked and **PW1** refused to open. She peeped through a hole and saw shoes, she also noticed a motor bike next to the kitchen. She locked the house from the outside and called her neighbours who forced open the door and found the appellant and the girl in the kitchen.

The appellant was apprehended. The girl escaped only to be found later. **PW3 & 4** confirmed having

found the appellant in the kitchen. PW5 was the investigating officer, **PW6** the doctor did not find any wounds, lacerations or spermatozoa at the point of examination. He however found no hymen. The examination was done a day after the alleged event.

6. In his defence the appellant denied having defiled PW1. He alleged to have gone to the kitchen looking for **PW2** and when **PW2** came and found him she locked the door and called people who beat him up.

7. The issues for determination is whether the appellant was accorded a fair hearing, secondly whether or not he defiled the minor.

The complainant of lack of a fair hearing was due to the 6 times the matter was adjourned. Having considered the adjournments sought for, reasons given, as against the gravity of the offence I do not doubt the decision of the magistrate in allowing the adjournment. Reasons given were not lacking and therefore this ground must fail.

PW1 aged 15 years narrated what happened on the 17<sup>th</sup> of February 2012. She said that the appellant went, pushed the door and she allowed him in as she knew him. They undressed slept and had sex. She had had sex with once before. She had sex with him only.

What is clear is that the appellant and the complainant had a sexual relationship before they were caught and this may explain why there were no wounds or laceration and the absence of the hymen. The above testimony is at per with the P3 form.

In answering whether indeed the appellant defiled the accused the court must consider the testimonies of the prosecution witnesses. I do find that PW1 was a truthful witness, her evidence is corroborated by that of **PW2, 3 & 4**. Indeed, no other explanation or hypothesis can be deduced from the events of that morning when **PW1** found a man sleeping with her daughter at 4.00 a.m.

8. For reasons above I am of the view that the prosecution evidence was cogent and do agree with the conviction and sentence meted out.

The appeal therefore fails.

**DATED and DELIVERED at BUNGOMA this 10th day of November 2016.**

**ALI-ARONI**

**JUDGE.**